CF0000062364

(2)

Division Bench (Criminal)

IN THE HIGH COURT OF MADHYA PRADESH JUDICATURE JABALPUR

CRIMINAL APPEAL NO. 2942 /99

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE.

APPELLANTS: : 1. Modiyam Kanna Rao son of Dorla, aged 33 years.

2. Tatiram Babu, son of Malla Dorla, aged about 21 years.

3. Mani Dharmayya son of Narsa Dorla aged about 31 years.

4. Tati Malla son of Munni-Dorla aged about 28 years.

5. Tati Munni son of Pappayya aged about 46 years.

6. Tati Ramlu son of Narsa aged about 29 years.

7. Tati Krista son of Narasayya aged about 33 years.

8. Chinta Mutta son of Bujja aged about 25 years.

9. Modiyam Kanna son of Dula aged about 36 years.

10. Chintam Krista son of Mutta aged about ~~29 years~~ 36 years.

11. Dhurta Hoonga son of Bablu aged about 29 years.

12. Sodhi Kankayya son of Mutta aged about 31 years.

13. Kadti Bhima son of Lakshmayya aged about 21 years.

All cultivators and residents of village Lankapalli, Police-Station Usur, Dist. Dantewara, M.P.

-Versus-

RESPONDENT : State of Madhya Pradesh.

.....2

(13748) 28/10/99 P. Trivedi

CLERK O/o. Advocate General M.P. JABALPUR

(36)

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक G.A.2942/99 **सन्** ~~200~~

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench: -

Hon'ble Mr. L.C. Bhadoo and
Hon'ble Mr. Satish K. Agnihotri, JJ.

19-7-2006

Mr. Rajesh Jain & Mrs. Kiran Jain, counsel for the appellants.

Mr. U.N.S. Deo, Additional Public Prosecutor for the State/ respondent.

Oral judgment dictated on *Dais.*

Per L.C. Bhadoo, J: -

By this appeal under Section 374 (2) of the Code of Criminal Procedure, the accused/appellants namely, Modiyam Kanna Rao (Sarpanch of the village), Tatiram Babu, Mani Dharmayya, Tati Malla, Tati Munni, Tati Ramlu, Tati Krista, Chinta Mutta, Modiyam Kanna S/o Dula, Chinta Krista, Dhurta Hoonga, Sodhi Kankayya & Kadti Bhima, have questioned the legality and correctness of the judgment of conviction and order of sentence dated 1-10-1999 passed by the 1st Additional Sessions Judge, Bastar at Jagdalpur, in Sessions Trial No.15/99, whereby learned Additional Sessions Judge after holding the above accused/appellants guilty for commission of offence under Sections 147, 302 read with Section 149, 328 & 201 of the I.P.C. sentenced each of the accused to undergo R.I. for one year and pay a fine of Rs.100/-, in default of payment of fine to further undergo R.I. for one month; to undergo imprisonment for life; to undergo R.I. for five years and pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for three months; and to undergo R.I. for one year and pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

for one month, respectively. Apart from that, accused Modiyam Kanna Rao (Sarpanch of the village), Tatiram Babu, Mani Dharmayya & Kadti Bhima have also been convicted under Section 148 of the I.P.C. and each of them has been sentenced to undergo R.I. for one year and pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for one month. However, they were acquitted of the charge under Section 120-B of the I.P.C.

The case of the prosecution is that on 1-10-1998 deceased Sodi Narayan went to his daughter Telam Sammi's Village: Kamargudapara Murdanda and informed her that the Sarpanch of Village: Lankapalli namely, Modiyam Kanna Rao is having grudge and animosity against him as the Sarpanch was saying that Narayan is practicing witchcraft and hatching a conspiracy in order to eliminate him. On 5-10-1998, Sodi Narayan left for his village. On 6-10-1998, Telam Sammi came to know that accused Modiyam Kanna Rao and other accused persons had convened a meeting and thereafter, they assaulted her father with axe, fists & legs, and they also forced him to consume stool mixed with poison. Coming to know about the incident, on 6-10-1998, she went to Village: Lankapalli and remained in the house of her cousin brother Dhurva. She came to know that at about 4-5 p.m. accused Modiyam Kanna Rao (Sarpanch) came along with his associates to the residence of her father and attacked him with axe, club, fists & legs as a result of which he became unconscious and considering him as dead, they left the place of incident. Then again on 7-10-1998, accused Modiyam Kanna Rao along with his associates came to the residence of her father, assaulted and murdered him. Thereafter, in furtherance of

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

common object, they burnt the body of her father. Based on this, Dehati Merg Intimation (Ex.P-18) was recorded on 17-10-1998 at 5.10 p.m. and thereafter, Merg Intimation (Ex.P-16) was recorded on 19-10-1998 at 12.35 p.m. Based on that, F.I.R. (Ex.P-17) was registered on 17/19-10-1998. Investigating Officer R.S. Patel left for the scene of occurrence and prepared the site plan Ex.P-19. Panchnama Ex.P-2 regarding the death of Sodi Narayan was prepared on 18-10-1998 in presence of the witnesses. On 18-10-1998, accused Modiyam Kanna Rao gave information (Ex.P-3) in police custody and in pursuance of that, a stone was recovered at his instance under Ex.P-4. On the same day i.e. on 18-10-1998, while in police custody, accused Tatiram Babu gave information (Ex.P-5) and in pursuance of that, he got recovered an axe under Ex.P-6. Accused Mani Dharmayya gave information (Ex.P-7) and in pursuance of that, he got recovered an axe under Ex.P-8. At the instance of Telam Sammi, daughter of the deceased, burnt bones of Sodi Narayan, ash and plain soil were taken into possession under Ex.P-9. Recovered articles were sent to Medical College, Raipur and also to the Forensic Science Laboratory, Sagar, under Exs.P-20 to 22, from where the report (Ex.P-36) was received from FSL, Raipur, and the report (Ex.P-37) of the Medicolegal Institute, Bhopal regarding bones and ash of the deceased was received.

After completion of investigation, charge sheet was filed against the accused persons in the Court of Chief Judicial Magistrate, Dantewada, who in turn committed the case to the Sessions Judge, Jagdalpur from where learned 1st Additional Sessions Judge, Bastar at Jagdalpur received the case on transfer for trial.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Learned Additional Sessions Judge after hearing Additional Public Prosecutor and counsel for the accused persons and also after perusing the record was of the opinion that prima facie offence under Sections 147, 148, 328, 302 read with Section 149, 120-B and 201 of the I.P.C. were made out against the accused persons. Accordingly, he framed the charges, same were read over and explained to the accused persons. Each of the accused denied the charges and claimed to be tried.

The prosecution in order to establish charges against the accused persons examined nine witnesses. On the other hand, statements of accused were recorded under Section 313 of the Cr.P.C. in which each of the accused denied the prosecution evidence appearing against them, stated that they are innocent and they have been falsely implicated in the crime.

Learned Additional Sessions Judge after hearing the arguments of Additional Public Prosecutor and counsel for the accused persons convicted and sentenced each of the accused as mentioned in paragraph 1 of this judgment.

We have heard learned counsel for the parties.

As far as the question of homicidal death of Sodi Narayan is concerned, learned counsel for the accused/appellants submitted that the prosecution has utterly failed to establish that Sodi Narayan met with homicidal death, as there is no evidence.

On the other hand, Mr. Deo, learned Additional Public Prosecutor supported the judgment of the trial Court.

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आदेश पत्रक (पूर्वानुबद्ध)

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The case of the prosecution is that in the first instance, accused persons assaulted the deceased with axe, fists and legs, and also forced him to consume stool mixed with poison. Thereafter, on 7-10-1998, the accused persons again came to the house of Sodi Narayan, attacked him with axe, fists and legs, considering him as dead, they took his body on a cot and set it on fire. To this extent, the evidence of the wife of Late Sodi Narayan namely, Sodi Badki (PW-7) has been adduced and she has stated that all the accused persons assaulted her husband in the meeting and they also forced her husband to consume stool mixed with poison. Thereafter, they brought her husband to the residence, they again assaulted him in the courtyard of her house, as a result of which her husband became unconscious and thereafter, they took her husband on a cot considering him as dead. Her husband's hands & legs were chopped. The accused persons also threatened her that they will kill her also. They also assaulted her husband in the Panchayat and at her residence, they kept the body on wood and tied the body with wood and thereafter set him on fire. R.S. Patel (PW-9), the Investigating Officer, has stated in his evidence that on 18-10-1998, at the instance of Telam Sammi (PW-8), daughter of the deceased, he went to the place of occurrence, from where bones & ash of the body of Sodi Narayan were taken into possession under Ex.P-9, same were sent in sealed condition to the Medical College and from where the report (Ex.P-37) was received regarding bones & ash and it has been mentioned that the bones were of human origin. Therefore, in view of the above evidence, it is established that in the first instance, Sodi Narayan was assaulted with axe, legs & fists, when he became unconscious,

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considering him dead, they took him from the house and set him on fire. In the circumstances, it is established that Sodi Narayan met with homicidal death.

Now, coming to the involvement of the accused persons in committing the murder of Sodi Narayan in furtherance of common object, Sodi Badki (PW-7), the wife of deceased Sodi Narayan, has stated in her evidence that Sodi Narayan was her husband and Muriyam Lachhmayya was her father, both of them are dead. The accused persons present in the Court had murdered them. Accused Modiyam Kanna Rao called a meeting in the village in which all the accused persons were present, she was also present, and her husband Sodi Narayan & father Lachhmayya were also present in the meeting. Accused Modiyam Kanna Rao told the accused persons "what you are seeing, attack them", on which Muriyam Lachhmayya & Sodi Narayan were attacked with club & Lathi. Thereafter, all the accused persons forced Muriyam Lachhmayya & Sodi Narayan to consume stool mixed with poison, thereafter, they took them to their residence and again assaulted Sodi Narayan in the courtyard of her house. Accused Tatiram Babu & Mani Dharmayya attacked Sodi Narayan with axe on neck & chest, respectively, whereas, Sarpanch Modiyam Kanna Rao attacked with wood on head & neck. All the accused persons attacked with Lathi, club, fists & legs, as a result of which her husband became unconscious. Considering him as dead, they took him on a cot, thereafter, kept his body on wood, tied the same and set it on fire. Legs and hands of deceased Sodi Narayan were also chopped. Telam Sammi (PW-8), daughter of deceased Sodi Narayan, has stated in her evidence

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that accused Modiyam .Kanna Rao attacked her father with club, Tatiram Babu, Mani Dharmayya & Kadti Bhima with axe and other accused persons with legs & fists. As per the evidence of Investigating Officer R.S. Patel (PW-9), at the instance of Modiyam Kanna Rao, Tatiram Babu & Mani Dharmayya, stone and axe were recovered under Exs.P-4, P-6 & P-8. Therefore, involvement of accused Modiyam Kanna Rao, Tatiram Babu & Mani Dharmayya in committing the murder of Sodi Narayan in furtherance of common object of the unlawful assembly, is established.

As far as the evidence of Telam Sammi regarding the involvement of Kadti Bhima that he attacked Sodi Narayan with axe is concerned, the evidence of Telam Sammi to that extent has not been corroborated by other evidence. Therefore, her evidence does not inspire confidence, because, in the first instance, no axe has been recovered at the instance of Kadti Bhima. Even the mother of Telam Sammi namely, Sodi Badki (PW-7) has not stated in her evidence that Kadti Bhima also assaulted deceased Sodi Narayan with axe. On the contrary, she has stated that Tatiram Babu & Mani Dharmayya assaulted Sodi Narayan with axe and Modiyam Kanna Rao attacked with club.

As far as the involvement of other nine accused persons namely, Tati Malla, Tati Munni, Tati Ramlu, Tati Krista, Chinta Mutta, Modiyam Kanna S/o Dula, Chinta Krista, Dhurta Hoonga & Sodhi Kankayya, is concerned, after perusal of the evidence of Telam Sammi (PW-8) & Sodi Badki (PW-7), who are the only material witnesses in this case, we are of the considered opinion that the prosecution has not been able to establish their involvement in the crime in question beyond reasonable doubt for

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

the reason that both these witnesses have not named these accused persons in their evidence before the Court, nor they have been identified in the Court by these witnesses, nor any recovery was effected from these accused persons. Only the part played by accused Modiyam Kanna Rao, Tatiram Babu & Mani Dharmayya has been stated. For the remaining accused persons, only omnibus statement has been made that all the accused persons attacked the deceased and they were members of the unlawful assembly. In order to establish the involvement of these nine accused persons in committing the murder of Sodi Narayan and that they were members of the unlawful assembly, the prosecution through these two witnesses ought to have adduced the evidence by naming each of the accused that they were members of the unlawful assembly and each of them acted in the crime in furtherance of common object of the unlawful assembly or if it was not possible for the witnesses to take their names in the Court evidence, then at least the witnesses ought to have identified these accused by indicating towards each of the accused in their Court evidence that he was member of the unlawful assembly at the time of commission of crime. On the safer side, the Investigating Officer looking to the large number of accused persons ought to have arranged identification parade before a Magistrate by these witnesses during the investigation. Based on the above evidence, unless each of the accused, who is involved in the crime, is identified before the Court and stated that particular accused was member of the unlawful assembly and he took part in the commission of crime, merely by saying that the accused persons were members of the unlawful assembly and they were part of the attack,

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they cannot be held guilty on such a weak evidence. In the circumstances, we are of the considered opinion that the prosecution has utterly failed to establish involvement of the above nine accused persons in commission of the crime.

However, as mentioned earlier, involvement of accused Modiyam Kanna Rao (Sarpanch), Tatiram Babu & Mani Dharmayya stands established and to this extent their conviction and sentence under Section 302 read with Section 149 of the I.P.C. is correct and we do not find any illegality and infirmity in the judgment of the trial Court.

As far as the commission of offence under Section 328 of the I.P.C. that these accused persons forced Sodi Narayan to consume stool mixed with poison is concerned, there is no evidence that the accused persons brought any poison and the deceased was forced to consume the same. In the absence of cogent evidence that in fact, the accused persons were in possession of poison, same was mixed with stool and then the deceased was forced to consume, it is difficult to hold the accused persons guilty for that offence. In other words, there is no cogent and clear evidence to the effect that the accused persons mixed the poison in stool and the deceased was forced to consume the same. The prosecution has failed to establish offence under Section 328 of the I.P.C. against accused persons.

As far as conviction under Section 147 of the I.P.C. is concerned, as has been referred earlier from the evidence of Telam Sammi (PW-8) & Sodi Badki (PW-7), that there were more than five accused persons i.e. apart from Modiyam Kanna Rao, Tatiram Babu & Mani Dharmayya, other accused persons were also there, therefore, the accused persons

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were members of the unlawful assembly and the object of that unlawful assembly was to assault and commit the murder of Sodi Narayan. Hence, accused Modiyam Kanna Rao (Sarpanch), Tatiram Babu & Mani Dharmayya have rightly been convicted under Section 147 of the I.P.C.

As far as conviction under Section 148 of the I.P.C. is concerned, it is established from the evidence that axe was recovered at the instance of accused Tatiram Babu & Mani Dharmayya and similarly, stone was recovered at the instance of accused Modiyam Kanna Rao. Therefore, they were members of the unlawful assembly having deadly weapons with them. These three accused persons have rightly been convicted under Section 148 of the I.P.C.

As far as conviction of accused Kadti Bhima under Section 148 of the I.P.C. is concerned, as has been discussed in the earlier part of this judgment while discussing conviction under Section 302 read with Section 149 of the I.P.C., the prosecution has failed to establish the crime against Kadti Bhima that he was having axe and attacked the deceased, therefore, his conviction under Section 148 of the I.P.C. also cannot be sustained.

As far as conviction under Section 201 of the I.P.C. is concerned, Sodi Badki (PW-7) has stated in her evidence that these accused persons after attacking her husband Sodi Narayan, considering him as dead, took his body on a cot, kept it on wood, tied the body with the wood and thereafter, set it on fire. From the place of occurrence, bones and ash were recovered by Investigating Officer R.S. Patel under Ex.P-9. Therefore, from the above evidence, it is established that these three

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accused persons viz., Modiyam Kanna Rao (Sarpanch), Tatiram Babu & Mani Dharmayya in order to cause disappearance of evidence of the murder of Sodi Narayan with intention to screen themselves from legal punishment burnt the body of Sodi Narayan. Therefore, they have been rightly convicted under Section 201 of the I.P.C. As has been mentioned earlier, as far as other accused persons are concerned, they have not been identified.

In the result,

1. Conviction and sentences imposed upon accused Tati Malla, Tati Munni, Tati Ramlu, Tati Krista, Chinta Mutta, Modiyam Kanna S/o Dula, Chinta Krista, Dhurta Hoonga, Sodhi Kankayya & Kadti Bhima under Sections 302 read with Section 149, 328, 147, 148 & 201 of the I.P.C. cannot be sustained. The appeal to that extent succeeds and the same is accordingly, allowed. Conviction and sentences imposed upon the above accused/appellants under the aforesaid Sections are set aside and they are acquitted of the said charge.

2. Conviction and sentence imposed upon accused Modiyam Kanna Rao (Sarpanch), Tatiram Babu & Mani Dharmayya under Section 328 of the I.P.C. cannot be sustained and the same are set aside and they are acquitted of the said charge.

3. So far as offence under Sections 302 read with Section 149, 147, 148 & 201 of the I.P.C. is concerned, the appeal of Modiyam Kanna Rao (Sarpanch), Tatiram Babu & Mani Dharmayya fails

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and the same is dismissed. Conviction and sentences imposed upon them are maintained.

4. It is said that accused Tati Malla, Tati Munni, Tati Ramlu, Tati Krista, Chinta Mutta, Modiyam Kanna S/o Dula, Chinta Krista, Dhurta Hoonga, Sodhi Kankayya & Kadti Bhima are on bail. They need not surrender and their bail bonds are discharged. However, accused Modiyam Kanna Rao, Tatiram Babu & Mani Dharmayya are directed to surrender before the trial Court in order to undergo the sentences imposed upon them and their bail bonds are cancelled.

Before parting with the judgment, we would like to observe that it is sad that in such a heinous crime on account of the lapse of investigation, the prosecution agency as well as the indifferent attitude of the Presiding Officer, the above ten accused persons have been acquitted. The perusal of record shows that the investigation has been conducted in a very casual and cavalier manner without realizing the sensitivity of the matter. Equally, the Prosecutor before the Court has not conducted the case with sincerity. He did not care, while examining the prosecution witnesses, to ensure that the evidence of prosecution witness must be adduced in a proper manner about the involvement of each accused. The Presiding Officer, who was a Judicial Officer of the rank of Sessions Judge, was equally casual and careless while recording the evidence. The manner in which he recorded the evidence shows that he remained as a silent spectator. Time and again, the Apex Court has lamented upon such Judicial Officer and has observed that while conducting the proceeding, the Judicial Officer must participate

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

actively in the proceeding and he is not expected to remain as silent spectator. Wherever he feels necessary, he himself can ask questions to the witness in order to bring on record the correct position. In a recent judgment in **Zahira Habibullah Sheikh & another v. State of Gujarat & others** reported in **2006 AIR SCW 1340**, the Apex Court observed that *fair trial would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an over hasty stage-managed, tailored and partisan trial.*

Let a copy of this judgment be sent to Home Secretary, Law Secretary, Registrar General of the High Court, Director General of Police and Director (Prosecution) for needful and necessary action.

Parties are entitled for certified copy of this order.

Sd/-
L.C.BHADOO
Judge

Sd/-
Satish K. Agnihotri
Judge

Soma

24.7.06